BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 29 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 381

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF THEREON.

FRANK ROBERSON,
HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
Solicitors for Petitioner, Z. & F. Assets Realization Corporation.

JOHN BASSETT MOORE,
JOSEPH M. PROSKAUER,
Of Counsel.

BLANK PAGE

INDEX.

TABLE OF CONTENTS.

Cases Cited.

Statutes Cited.

Authorities Cited.

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Z. & F. Assets Realization Corporation respectfully shows to this Honorable Court:

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

That the petitioners were plaintiffs in a suit in equity, brought in the Supreme Court of the District of Columbia, asking for a declaratory judgment that certain Sabotage Claimants, including intervener-defendant, were not entitled to share in a Special Deposit Fund created by the Settlement of War Claims Act of 1928, which set aside specific funds in a limited amount for the payment of

awards made by the Mixed Claims Commission established by the United States and Germany under the agreement concluded on August 10, 1922 (see Appendix), pursuant to the Treaty of Berlin of August 25, 1921 (42 Stat. 1939).

That on the 6th day of January, 1940 (R. 298) there was entered a decree granting the motion of intervener-defendant to dismiss the bill of complaint and the bill of intervention of the plaintiff-intervener, and that this judgment was on the 3rd day of June, 1940, affirmed by the United States Court of Appeals for the District of Columbia.

That by the terms of the Agreement of August 10, 1922, (Article II), the Commission consisted of two Commissioners, one appointed by each Government, and, for the decision of any cases or points on which the Commissioners disagreed, the two Governments were to select an Umpire, and it was stipulated (Article VI) that "the decisions of the Commission and those of the Umpire (in case there may be any) shall be final and binding upon the two Governments". The two Governments chose as Umpire, a citizen of the United States. By the rules of the Commission, the Umpire had power to act solely in the event that both Commissioners certified to him, in writing, their disagreement.

That the alleged awards now in question, having been made by the American Commissioner and the Umpire after the German Commissioner had retired, are not awards within the meaning of the Settlement of War Claims Act of 1928, the Treaty of Berlin of 1921, and the Agreement of 1922, (1) because the sole question before the Commission prior to the retirement of the German Commissioner was whether the previous decision of the Commission dismissing the claims should be set aside and the claims reheard; (2) because no conclusion on that question had been reached and recorded; (3) because the American Commissioner and the Umpire, even if they had been entitled thereafter to function as the "mixed commission," which, by the express terms of the Agreement of 1922, consisted

of a Commissioner appointed by each Government, could not have made an award without an actual rehearing.

That the petitioners, and others similarly situated, are holders of awards granted long prior to June 15, 1939, and in most cases prior to the passage of the Settlement of War Claims Act of 1928 (R. 3). This action is brought by petitioner in behalf of itself and all other American holders of awards granted prior to June 15, 1939.

That the five awards to petitioner, with interest to January 1, 1928, aggregate the sum of $1,175,918.78, on account of which petitioner has received the sum of $864,048.31, leaving a balance unpaid of $311,870.47, which with interest to January 15, 1936, makes a total aggregate unpaid balance of $599,373.96 (R. 3).

That by contrast, the Sabotage Claims, on which the professed awards of October 30, 1939, were made, were dismissed nine years before by the actual Commission, lawfully functioning, on October 16, 1930 (R. 224, 260). But, while the question now pending has in a sense an international aspect, it is in substance not a conflict between the United States and Germany but is *a contest between adverse American claimants to share in a fund created by an act of Congress, which fund, is estimated to be $24,000,000* (R. 28).

Petitioners deny that the Sabotage Claimants have, under the alleged awards of the American Commissioner (Hon. Christopher B. Garnett) and the Umpire (Hon. Owen J. Roberts), a right to share in the Special Deposit Fund, and this denial rests on the following grounds:

(1) The Mixed Commission was *functus officio* as to the Sabotage Claims after their dismissal on October 16, 1930.

(2) Although the question of the merits of the claims was specifically withheld from the Commission prior to the decision of the American Commissioner and the Umpire to grant a rehearing, no rehearing on the merits was thereafter held.

(3) The American Commissioner and the Umpire, while assuming as regarded the Sabotage Claims to act as the Mixed Commission, never gave notice to any representative of Germany that they intended to assess damages on the claims, although the Agents of the respective Governments had theretofore stipulated that such assessment would be postponed until after the determination of Germany's liability (R. 243).

(4) they purported to make an award in favor of a corporation whose stock was beneficially owned by persons who were not American nationals;

(5) they assumed to give judgment as a majority of a tribunal, composed of three Commissioners, although the agreement under which they professed to act provided for no such body;

(6) the Umpire assumed to make an award without having received a written certificate of disagreement, signed by both of the Commissioners, although under the rules of the Commission, he had no power to act without such a certificate;

(7) the United States Commissioner and the Umpire purported to act and claimed to have the power to act by virtue, as they alleged, of the wrongful resignation of the German Commissioner, although the 1922 agreement (Article II) expressly provided for the filling of vacancies caused either by death or by retirement, thus clearly implying that the *Mixed* Claims Commission could not function until such steps had been taken.

That pursuant to the provisions of the Treaty of Berlin and of the terms of the agreement annexed to the complaint, the Mixed Claims Commission was established to adjudicate the claims of American nationals.

That prior to 1930, the sabotage claimants filed numerous claims, including claims of Lehigh Valley Railroad Com-

pany, Bethlehem Steel Corporation and Agency of Canadian Car & Foundry Company, Ltd. (R. 82, 223). These claims were dismissed:

First, October 16, 1930, upon the original hearing (R. 224, 260).

Second, March 30, 1931, upon application for rehearing (R. 225). No evidence was filed with this application for rehearing.

Third, December 3, 1932, upon second application for rehearing (R. 225).

That the third petition for rehearing filed May 4, 1933, prayed for (R. 228):

> "reopening and rehearing of the decisions in these claims; the United States reserving the right to complete the evidence", etc.

Thus, the sole relief asked for in said petition was "reopening and rehearing of the decisions in these claims" (R. 228).

That in 1935 the American Agent filed a motion for an order finally disposing of the claims on the merits, which motion was denied, Umpire Roberts saying (R. 231):

> "By the petition and answer an issue was framed. * * * Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening *vel non*, and not upon the merits" (R. 234).

That upon an argument had before the Commission on June 3, 1936 Umpire Roberts again reiterated that the pro-

ceedings before the Commission remained strictly limited to the issue of fraud, stating as follows (R. 232):

> "Whether upon the showing made, the Commission should grant a rehearing, *unless Germany shall agree to a different course,* must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate and distinct from any argument on the merits." (Italics ours.)

Germany never agreed to a different course (R. 233).

That in said opinion thus limiting the issue, one of the dismissal decisions was set aside, namely, the decision (December 3, 1932) that if new evidence were formally placed before the Commission and considered in connection with the whole body of evidence, the findings and conclusions then reached would not be reversed or materially modified (R. 232).

The fact is not disputed that this left the original dismissal of the Sabotage Claims, in 1930, in full force and effect, subject only to the motion then pending to *rehear* on the specific ground of fraud (R. 232).

That the request that the Commission decide the merits of the sabotage claims was again made by the American Agent in his brief filed on September 13, 1938, but the German Agent in his brief filed in answer thereto on November 16, 1938 refused to consent to the course of procedure requested (R. 233). The request was repeated on January 27, 1939, and was again refused (R. 235). All the circumstances are set forth in the answering affidavit (R. 233-235), and the fact is that consent was never given.

After extended argument in January 1939, the Commission met to deliberate on the application for a rehearing (R. 235); and during the deliberations the German Commissioner retired. It is claimed by the American Commissioner and Umpire, and by the defendant-intervener, that, when the German Commissioner retired, there had been a disagreement as to the points at issue within the meaning of the international agreement under which the Commission

was established. This allegation the plaintiff denies (R. 236).

Article II of the agreement of 1922, regarding the constitution of the Mixed Commission, reads as follows:

> "The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners *die or retire,* or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him." (Italics ours.) (Appendix p. ii.)

Bearing in mind the fact that a Mixed Commission means a commission in which each government is represented by a commissioner or commissioners appointed by itself, it is clear that both the United States and Germany, in providing for the filling of vacancies, contemplated that, in case its commissioner should "retire or be unable for any reason to discharge his functions," the work of the Commission would be arrested until the Government by which he was appointed had filled his place.

Nevertheless, notwithstanding the fact that, when the German Commissioner retired, nothing was pending but a motion to reopen the original dismissal of the sabotage claims, the American Commissioner and the Umpire not only proceeded to reopen the original dismissals, but went further and assumed to make awards in favor of the Sabotage Claimants, the Umpire finally saying: "The Commission is prepared to sign awards, to be submitted by the American Agent, if approved by the Commission as to form." (R. 242).

That this was done not only when nothing but a motion

to reopen was pending but when there had been a specific reservation that the question of the amount of the awards would in any event not be gone into until after the question of Germany's liability had been determined (R. 35, 84, 224, 343).

That although there had been an express arrangement (Answer of defendant-intervener (R. 35), affidavit of Martin (R. 84), affidavit of Rogers (R. 224)), reserving the question of damages to a later stage of the proceedings when Germany's liability should first have been established, the Umpire, an American, after conferences with the American Commissioner, and without counter-evidence submitted by the German Government, and without notice to it, fixed the amount of damages to be awarded to each of the sabotage claimants and granted awards based upon such determination (R. 243).

That on October 30, 1939, the American Commissioner presented to the Umpire 153 awards to sabotage claimants totalling, with interest to January 1, 1928, a sum in excess of Thirty-one million Dollars ($31,000,000) (R. 63-73). These awards were filed with the Commission on that day (R. 108).

That even though the shares of stock of the Agency of the Canadian Car and Foundry Company, Ltd. were fully owned by a Canadian corporation (R. 254), on October 30, 1939, an award was granted to said company in the sum of $5,871,105.20 with interest at the rate of five per cent. (5%) from January 31, 1917 to date of payment (R. 181) which, with interest from January 31, 1917, to January 1, 1928, amounts to more than $8,750,000.

That the District Court dismissed the complaint on the ground that the certificate of the Secretary of State certifying the awards was controlling. The United States Court of Appeals of the District of Columbia affirmed this judgment, not on the ground that the certificate of the Secretary of State correctly determined the merits of the case, but on the ground that the questions involved were political and beyond judicial review.

JURISDICTION.

The jurisdiction of this Court to issue the writ of certiorari applied for rests upon Title 28 of the United States Code Annotated, Section 347.

QUESTIONS INVOLVED.

The questions involved are:

First. Whether the respective rights of the petitioners and the defendant-intervener to receive payment from the special fund involved a political question not justiciable by the courts.

Second. Whether the certificate of the Secretary of State certifying the awards is conclusive and not subject to judicial review.

Third. Whether, after the retirement of the German Commissioner, the Umpire and the American Commissioner were authorized to function as a commission and make awards.

Fourth. Whether the alleged awards now in question are not void because, when the American Commissioner and the Umpire assumed to make them, the sole question pending before the commission was whether there was proof of fraud that justified a rehearing.

Fifth. Whether, even if properly constituted, the Mixed Claims Commission was empowered to grant a rehearing.

Sixth. Whether the Mixed Claims Commission, even if properly constituted, was authorized to grant an award to the Agency of Canadian Car & Foundry Company, Ltd., whose stock was entirely owned by the parent Canadian company, a non-American national.

Reasons Relied on for the Allowance of the Writ.

That the United States Court of Appeals for the District of Columbia erred in deciding:

1. That the respective rights of the petitioners and the defendant-intervener to receive payment from the special fund involved a political question not justiciable by the courts.

2. That the certification of the awards by the Secretary of State precluded any judicial review.

3. That, after the retirement of the German Commissioner, the Umpire and the American Commissioner were authorized to function as a commission and make awards.

4. That the alleged awards are valid, in spite of the fact that, when the American Commissioner and the Umpire assumed to make them, the sole question before the Commission was whether there was such proof of fraud as justified a rehearing.

5. That the Mixed Claims Commission was empowered to grant rehearings of its awards.

6. That as, by the agreement between the United States and Germany, under which it was constituted, the Mixed Claims Commission was authorized to adjudicate only the claims of United States citizens or nationals against Germany, it had [redacted] power to make an award to the Agency of Canadian Car & Foundry Company, Ltd., whose stock was wholly owned by the parent Canadian company.

That the questions here involved are of general importance and questions of substance relating to the construction of a statute of the United States and of a treaty and Executive Agreement made thereunder.

WHEREFORE, your petitioner prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia in this cause, there entitled *Z. & F. Assets Realization Corporation, a Delaware corporation, Plaintiff-Appeliant, American-Hawaiian Steamship Company, Intervener-Plaintiff-Appellant,* v. *Cordell Hull, Secretary of State, and Henry Morgenthau, Secretary of Treasury, Defendants-Appellees, Lehigh Valley Railroad Company, Intervener-Defendant-Appellee,* No. 7396, that said cause may be reviewed and determined by this court, and that the judgment of the said United States Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this court may deem meet and proper.

Z. & F. ASSETS REALIZATION CORPORATION,
FRANK ROBERSON,
HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
Solicitors for Petitioner.

JOHN BASSETT MOORE,
JOSEPH M. PROSKAUER,
Counsel for Petitioner.

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Supreme Court of the District of Columbia is not yet reported and may be found on page 295 of the record. The opinion of the United States Court of Appeals is not yet reported.

Jurisdiction.

The jurisdiction of this Court to issue the writ of certiorari applied for is predicated upon Title 28 of the United States Code Annotated, Section 347.

The reasons relied on for the allowance of the writ are that the United States Court of Appeals for the District of Columbia decided questions of general importance, and questions of substance relating to the construction of a statute of the United States and a treaty of the United States and an Executive Agreement made by the United States, which questions have not been, but should be, settled by this Court.

Statement of the Case.

The statement of the case is set forth in the petition for writ herein.

Specifications of Error.

The United States Court of Appeals erred in deciding:

First. That the respective rights of the petitioners and the defendant-intervener to receive payment from the special fund involved a political question not justiciable by the courts.

Second. That the certification of the awards by the Secretary of State precluded any judicial review.

Third. That, after the retirement of the German Commissioner, the Umpire and the American Commissioner were authorized to function as a commission and make awards.

Fourth. That the alleged awards are valid, in spite of the fact that, when the American Commissioner and the Umpire assumed to make them, the sole question before the Commission was whether there was such proof of fraud as justified a rehearing.

Fifth. That the Mixed Claims Commission was empowered to grant rehearings of its awards.

Sixth. That as, by the agreement between the United States and Germany, under which it was constituted, the Mixed Claims Commission was authorized to adjudicate only the claims of United States citizens or nationals against Germany, it had the power to make an award to the Agency of Canadian Car & Foundry Company, Ltd., whose stock was wholly owned by the parent Canadian company.

Statutes and Treaties Involved.

Article III, Clause 1, Section 2, of the Constitution of the United States; the pertinent provisions of the Treaty of Berlin of August 25, 1921, and the English text of the Agreement of August 10, 1922, together with the relevant provisions of the Commission's rules and of the Settlement of War Claims Act, are set out in the Appendix.

Summary of Argument.

I. The conflict of the respective claims of the old award holders and the sabotage claimants to payment from the special deposit fund is not political in the sense of depriving the courts of jurisdiction.

II. The certificate of the Secretary of State that the awards were made is not conclusive as to their validity.

III. After the retirement of the German Commissioner, the Umpire and the American Commissioner were not authorized to function, and their so-called awards were not awards, but mere nullities.

IV. The alleged awards are mere nullities because, when the American Commissioner and the Umpire assumed the power to make them, the sole question before the Commission was whether there had been such fraud as might justify a rehearing.

V. Even if properly constituted, the Mixed Claims Commission was not empowered to grant a rehearing.

VI. The shares of stock of Agency of Canadian Car & Foundry Company, Ltd., being entirely owned by Canadian Car & Foundry Company, Ltd., a Canadian national, the Commission even if properly constituted had no jurisdiction to grant it any award.

Argument.

I.

The conflict between the old award holders and the sabotage claimants as to payment from the special deposit fund is not political in the sense of depriving the courts of jurisdiction to determine their respective rights in that regard.

The Court of Appeals, in holding that it had no jurisdiction to entertain the suit, based its decision solely on the assumption that the questions involved did not present a case or controversy which the courts could decide, because they were purely political.

Both the old award holders and the sabotage claimants assert their claims under Section 4 of the Settlement of War Claims Act providing for the payment of proper awards of a properly constituted Mixed Claims Commission.

Thus, there is presented to the Court a conflict of property rights under the statutes and treaties of the United States and therefore not a mere political question.

Willoughby, in his Constitutional Law of the United States, Second Edition, Section 855, page 1336, says:

> "When, however, private justiciable rights are involved in a suit, the court has indicated that it will not refuse to assume jurisdiction even though questions of extreme political importance are also necessarily involved.
>
> "Thus, as has been set forth in another chapter, [section 318] treaties entered into by the United States not only bind the United States internationally, but create municipal law for individuals so far as their personal rights and property are concerned. Thus a treaty having been entered into the court will follow

its terms even when, by doing so, it has to go counter to the position previously assumed by the executive department, or, indeed, contended for by the government in the case at bar."

Jaffe, "Judicial Aspects of Foreign Relations," cited by Justice Miller, says, page 233:

> "Many matters relating to foreign affairs which under this logic would be 'political' are, in fact, handled by the courts. *Courts determine whether a claim of sovereign immunity is properly asserted;* they interpret treaties; they determine whether Orders in Council relating to prizes are in conformity with international law; they delimit and apply the duties of neutrality. They may do these things in the absence of relevant executive action, thus running the risk of future conflict and contradiction; they may do it in the face of executive action already taken." (Italics ours.)

The same argument was made by the Government in the case of *Deutsche Bank* v. *Cummings,* 83 F. (2d) 554—that the Court did not have jurisdiction to protect the rights of the plaintiff, a former German enemy alien, whose property was sequestrated and who sought the return thereof after an attachment levied on the property had been vacated.

Referring to the case of *Chae Chan Ping* v. *U. S.,* 130 U. S. 581, 9 S. Ct. 623, cited by the Government for the proposition that the rights of the plaintiff in that case were political and, therefore, not the subject of a justiciable controversy, Judge Groner said (p. 563):

> "* * * the Supreme Court was at pains to point out the difference between rights of a political nature and rights involving property. As to the latter, the Supreme Court said: 'The rights and interests created

by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property capable of sale and transfer, or other disposition. * * *"

This Court, refusing to dismiss the *Deutsche Bank* case, 300 U. S. 115, for want of jurisdiction, reversed the decision of the Court of Appeals of the District of Columbia on other grounds.

Judge Miller, in his opinion in the present case, quotes from the *Head Money Cases,* 112 U. S. 580, 598, 599. In the very passage quoted by him, the following is stated:

"But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement, as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

In the following cases referred to by Jaffe, *supra*, the federal courts refused to follow the action of the Executive, where treaty rights were involved:

The Florence H, 248 F. 1012 (S. D. N. Y.);
United States v. *Watts*, 8 Sawyer 370 (D. Cal. 1882);
United States v. *Rauscher*, 119 U. S. 407;
Tartar Chemical Co. v. *United States*, 116 F. 726 (C. C. S. D. N. Y.).

It is well known that, where the non-recognition of a government by the Executive leads to unjust results, such non-recognition does not prejudice the private rights of the parties concerned.

Sokoloff v. *National City Bank*, 239 N. Y. 158;
Banque de France v. *Equitable Trust Co.*, 33 F. (2d) 202.

Potter, in his article referred to by Judge Miller, "The 'Political Question' in International Law in the Courts of the United States" (8 Southwestern Political and Social Science Quarterly 127, 137) said:

"* * * courts have, on several occasions, when asked to refrain from passing upon a given question, on the ground that it was political in character declined to accede to such a request * * *. Thus the courts have long since insisted upon their right to take up a treaty directly and enforce it without any intervention from the political departments (*United States* v. *The Peggy*, 1 Cr. 103). Again they have insisted upon their rights to interpret treaties where interpretation is needed (*United States* v. *Rauscher*, 119 U. S. 407. In one case the Supreme Court denied *obiter* any obligation to accept interpretations imposed by the political department where private rights are involved: *Charlton* v. *Kelly*, 229 U. S. 447.) And finally they have insisted upon applying customary international law in a few cases so as to scrutinize the acts of national adminis-

trative authorities and overrule them if need be—in cases involving jurisdiction over alien vessels or persons in port, and in cases of attempted extradition * * * (*Wildenhaus Case*, 120 U. S. 1; *United States* v. *Rauscher*, 119 U. S. 407)."

Therefore, in this case where there is a conflict of private rights, the complaint should not have been dismissed for want of jurisdiction on the ground that a political question was involved.

Furthermore, where an international tribunal exceeds its power, it has been held that the courts are competent so to decide; and effect has been given to their decision.

Comegys v. *Vasse*, 1 Peters 193;
Frevall v. *Bache*, 14 Peters 95;
Judson v. *Corcoran*, 17 How. 612;
VII Moore, Digest, Sec. 1072, page 30.

The Court has power to determine the scope of the Commission and whether the Commission has exceeded its powers.

Ralston, The Law and Procedure of International Tribunals, p. 42.

The Bootstrap doctrine (Harvard Law Review, Vol. 53, p. 652) that a decision of a court as to its own jurisdiction is *res adjudicata* (*Stoll* v. *Gottlieb*, 305 U. S. 165), does not apply to an arbitral tribunal which derives its charter from an agreement between two governments.

While nominally the claims are prosecuted by the United States and espoused by it, the claims are actually beneficially owned by the claimants.

Administrative Decision No. V, Dec. & Op., p. 192;
Matter of Westbrook, 228 App. Div. 549.

The claimants are the real parties in interest.

Thorpe on International Claims, 59, 60.

H.

The certificate of the Secretary of State certifying awards is not conclusive.

(A) Petitioners Have a Property Right in the Special Deposit Fund.

By the Settlement of War Claims Act of 1928 (45 Stat. 254), Sec. 2(b), the Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of the plaintiffs' awards, as certified pursuant to Sec. 2(a) of said Act. These payments are to be made out of the German Special Deposit Account created by Sec. 4 of the Act in the order of priority provided in Sec. 4(c).

The right to receive payments provided for by Congress is a property right passing to the estate in bankruptcy of the claimant.

Williams v. *Heard*, 140 U. S. 529;
Comegys v. *Vasse*, 1 Peters 193.

The Special Deposit Fund is a fund which is the propery of the United States, but by Section 4 of the Settlement of War Claims Act, that fund has been appropriated by Congress for the benefit of persons having bona fide awards.

Under the authority of *Houston* v. *Ormes*, 252 U. S. 469, where a fund has been appropriated by Congress for payment to a specified person, the Treasury officials are charged with the administrative duty to make payments on demand to the person designated and are therefore subject to mandamus.

To the same effect:

Parish v. *MacVeaugh*, 214 U. S. 124.

This Special Deposit fund consists of 20% of the German property seized during the war, unallocated interest thereon, the specific appropriation by Congress of more than $86,000,000 and the moneys received under the Paris agreement of January 14, 1925 and under the German-American debt agreement of June 23, 1930 (Report of Secretary of Treasury June 30, 1939, p. 76). Consequently, this action comes squarely within the cases holding that, where Congress has made an appropriation for certain persons, those persons may resort to the courts for the enforcement of their right of payment. It is utterly immaterial that these were moneys of the United States. As soon as an appropriation is made, until that appropriation is withdrawn, the direct beneficiaries of such appropriation have rights which may be protected in the courts from improper attack.

(B) In View of Petitioners' Property Right, the District Court had Jurisdiction to Grant a Declaratory Judgment Protecting the Petitioners from Payment of Awards That were Mere Nullities.

In *Perkins* v. *Elg*, 307 U. S. 325, suit was brought in the District Court of the District of Columbia for a declaratory judgment. The suit was brought against the Secretary of Labor, the Acting Commissioner of Immigration, and the Secretary of State. Declaratory judgment was sought for a declaration that that plaintiff was a citizen of the United States entitled to a passport.

The United States Supreme Court, although it was admitted that the issuance of a passport was within the discretion of the Secretary of State, modified the judgment affirmed by this Court by striking out that portion of the judgment which dismissed the bill of complaint as to the Secretary of State and adjudged that the Secretary of State be included in the declaratory provision of the decree adjudicating the plaintiff to be a citizen of the United States.

This case is clear authority for the proposition that if, as a matter of law, the sabotage awards are invalid and void, the plaintiff is entitled here as against the Secretary of State to a judgment to that effect.

(C) Congress did not Intend That the Certificate of the Secretary of State Should be Regarded as a Judicial Act Foreclosing Inquiry by the Courts.

The District Court held that under Section 2 of the Act of Congress, the legality of disbursements from the special deposit fund is exclusively determinable by the Secretary of State and that his certificate is conclusive.

Section 2 of the Settlement of War Claims Act of 1928 provides:

> "(a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission * * *.
>
> (b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified * * *."

Two things are necessary for payment:

(1) An award, *i.e., a valid* award;

(2) A formal certificate of the Secretary of State attesting a valid award.

The plaintiff's position is that, by the above quoted language, the Congress merely intended that the Secretary of State should authenticate the fact that an award had been made (in the same sense that a Notary Public authenticates the signature of the grantor), but that it never intended to vest in the Secretary of State the power to decide whether the authenticated award had been validly made or was in excess of the powers of the Commission itself. In other words, he is not called upon to examine the evidence or their jurisdiction and to affirm or revise the awards, which he certifies to the Secretary of the Treasury. In fact, the Secretary of State in this case acted within a few hours (R. 302, 312, 318), so had no time to make any judicial inquiry, which he must have assumed was not called for.

In construing a kindred statute providing for the issuance of a certificate by the Secretary of State, such certificate has been adjudicated by the courts to be merely a ministerial act and not conclusive. Thus, in the case of *Orinoco* v. *Orinoco Iron Co.*, 296 Fed. 965, 54 App. D. C. 218, the Orinoco Company, Ltd., hereafter called "Limited Company", had made, through the United States Government, a claim against Venezuela for indemnity because of her illegal annulment of a certain concession, which concession had vested in the Orinoco Company, Ltd. The appellee, the Orinoco Iron Company was the lessee from the Limited Company of mining rights and had expended $175,000 in exploiting and operating the mines, when the Limited Company was thus ousted. By virtue of the Act of February 27, 1896, chapter 34 (31 U. S. C. 547), all monies received by the Secretary of State from foreign governments and other sources, must be deposited in the Treasury. According to this Act, the Secretary of State is required to determine the amounts due claimants, and certify the same to the Secretary of the Treasury, who must, upon presentation of the certificates of the Secretary of State, pay the amount so found due.

After the payment was made into the Treasury of the United States, a controversy arose between the receiver of the Limited Company and the Orinoco Iron Company as to who was entitled to the fund and the latter sought to have the payment ordered made to it. The Secretary of State refused to recognize the claim of the Orinoco Iron Company and directed the payment of the money to the Limited Company and to other persons designated by it, and sent certificates to the Secretary of the Treasury for such distribution.

The Court of Appeals of the District of Columbia sustained the claim of the appellee, holding that the certificate of the Secretary of State did not interfere with the power of the court to declare the appellee entitled to an equitable lien on the fund and overruled the contention of the Secretary of the Treasury that his duty was merely ministerial

and that he must carry out the certificate of the Secretary of State. The dissenting opinion states that the Secretary of the Treasury could not be enjoined from carrying out the determination which the Secretary of State was vested with final and exclusive power to make, especially as the Secretary of the Treasury was directed by the statute to make payment in accordance with that determination. In fact, the dissenting Judge said:

> "If the Secretary of the Treasury may be enjoined from paying the money to the beneficiaries, it is not apparent why mandamus would not lie to compel payment to the plaintiff" (p. 226).

He went further and stated as follows:

> "Indeed, if it be true that the Secretary of the Treasury can be enjoined from making the payments directed by the Secretary of State, then, as a corollary of that proposition, it would seem that the findings of the Secretary of State may be controlled and directed by the judicial department of the government" (p. 226).

The majority of that court did not agree with his contention, and the holding of the majority was affirmed by the United States Supreme Court in *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121.

The statute in the *Orinoco* case seemed possibly to authorize the Secretary of State in his discretion to determine the amounts due claimants respectively from each of such trust funds (to wit, the trust funds represented by monies received from foreign governments).

In the present statute, no such discretion is vested in him. When he receives from the Commission copies of the awards, it is his duty to certify the same without further question and, therefore, as held in *Perkins* v. *Elg* (307 U. S. 325), he is subject to a declaratory judgment as to the rights of the various claimants to the special deposit fund.

III.

After the retirement of the German Commissioner, the Umpire and the American Commissioner were not authorized to function, and their so-called awards were not awards, but mere nullities.

Article II of the agreement creating the Commission provides:

> "The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him" (Appendix, p. ii).

The rules of the Commission provide (Article VIII, subdivision (a)):

> "(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified" (Appendix, p. v).

A similar provision in an international arbitration agreement was held to be mandatory on the tribunal. Thus, where arbitrators in a certain arbitration with Spain differed, and sought the opinion of the Umpire, Count Lewen-

haupt, as to the meaning of Article I providing that the Umpire "shall decide all questions upon which they shall be unable to agree", he held:

> "The functions of the umpire are limited by Article I of the agreement to the decision of questions upon which the arbitrators are unable to agree, and which they submit to him for decision. * * *
>
> "'* * * if one of the arbitrators refuses to certify the disagreement, the case cannot again come before the umpire under the agreement of 1871.'" (3 Moore, Arbitrations 2192.)

But in the present case there was even a greater limitation on the powers of the Umpire. He could only decide on matters about which the Commissioners were in disagreement after such disagreement had been certified to him in writing.

Inherent in every court is the power to make its rules of procedure, not inconsistent with the terms of the law or the agreement under which it is created, and these rules, as far as the parties or litigants are concerned, have the force of law and are controlling.

Nealon v. *Davis*, 18 F. (2d) 175, 57 App. D. C. 133;
United States v. *Barber Lumber Co.*, 169 Fed. 184;
Weil v. *Neary*, 278 U. S. 160.

In the *Greco-Turkish Agreement of December 1, 1926* (Permanent Court of International Justice Advisory Opinion No. 16 (August 28, 1928) Public Ser. B., No. 16, pp. 20, 21), the following clause appears:

> "Article IV.—'Any questions of principle of importance which may arise in the Mixed Commission in connection with the new duties entrusted to it by the Agreement signed this day and which, when that

> Agreement was concluded, it was not already discharging in virtue of previous instruments defining its powers, shall be submitted to the President of the Greco-Turkish Arbitral Tribunal sitting at Constantinople for arbitration. The arbitrator's awards shall be binding.'"

This clause gave rise to differences of interpretation regarding conditions for appeal to the arbitrator, and these differences were submitted to the Permanent Court of International Justice at the Hague for an advisory opinion. *The court held that while the two national commissioners could decide when questions of principle of importance arose, the president could act only when the two national commissioners decided that the matter was a question of principle.*

So, therefore, applying the rule announced as the principle of this decision, the Umpire in the present case is empowered to function only when there has been a disagreement certified to him by both Commissioners.

In view of the terms of the agreement, and in view of the fact that the Umpire could function, as such, only after receiving a written certificate of disagreement, the two remaining members could not function as a Mixed Commission.

The power to arrest further functioning of a commission so constituted is well recognized.

> "A controversy arose in the proceedings of the London commission under Article VII. of the Jay treaty as to the power of the commission to decide whether it possessed jurisdiction of claims on which a final decision had been rendered by the lords commissioners of appeal—the highest court of appeals in prize cases. In order to prevent the commission from acting on this question, the British commissioners asserted a right to withdraw from the board, the treaty requiring at least one of the commissioners on each side and

the fifth commissioner to be present at the performance of any act appertaining to the commission. In this way the progress of the board was brought to a halt" (VII Moore, Digest 33).

Similarly, the Mixed Claims Commission of Hungary and Roumania ceased to function when Roumania ordered its national judge to withdraw from that Commission (Collection of Opinions, Articles and Reports bearing upon the Treaty of Trianon, etc., Vol. II, by Dr. Vallotton of Lausanne, a member of the "Institut de Droit International" and former President of the American Norwegian Mixed Arbitral Tribunal (p. 231).

In the Treaty of Berlin, 42 Stat., part 2, page 1939, it is provided:

> "(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV" (Appendix, p. i).

The Treaty of Versailles, Part X, Article 304, provides for the creation of Mixed Arbitral Tribunals and provides that these tribunals shall be "a Mixed Arbitral Tribunal." This means that the tribunal shall consist of at least one national of each of the contending party nations.

If one of the commissioners resigns, therefore, the tribunal is no longer a mixed tribunal, especially when, as in this case, the two members left are both Americans.

It was never contemplated that the commissioner of one of the governments and an umpire being a citizen of the same government could be considered as a mixed commission.

It, therefore, clearly appears that after the German Commissioner retired, the functioning of the Commission was suspended until Germany appointed a successor.

IV.

The awards are mere nullities, because the sole question pending before the Mixed Commission when the American Commissioner and the Umpire, sitting alone, usurped the power to make them, was whether there was proof of fraud that justified a rehearing.

The sole question before the Commission was the motion to reopen based upon the petition filed May 4, 1933, praying for

> "reopening and rehearing of the decisions in these claims".

In 1935, Umpire Roberts ruled as follows:

> "By the petition and answer an issue was framed. * * * Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening *vel non*, and not upon the merits" (R. 231, 234).

On June 3, 1936, Umpire Roberts again ruled that this was then the sole issue. More than two years later, on September 13, 1938, the American Agent filed a brief in support of his petition for a reopening, and the German Agent on November 16 filed a brief in answer refusing his consent (R. 233). January 27, 1939, the request was repeated, and was again refused (R. 235). Then, after extended argument, the Commission met to deliberate on the application for a rehearing (R. 236), and during its deliberations the German Commissioner retired.

Thereafter, on June 15, 1939, although nothing was then pending but a motion to reopen the original dismissal of the Sabotage Claims, the American Commissioner and the

Umpire, assuming to function as the Mixed Commission, not only proceeded to reopen the dismissals but went further and made awards in favor of the Sabotage Claimants (R. 242).

And on October 30, 1939, although there had been an express arrangement (Answer of defendant-intervener (R. 35), affidavit of Martin (R. 84), affidavit of Rogers (R. 224)), reserving the question of damages to a later stage of the proceedings when Germany's liability should first have been established, the Umpire, after alleged conferences with the American Commissioner, without counter-evidence submitted by the German Government, and without notice to it, determined the amount of damages to be credited to each of the sabotage claimants and granted awards based upon such determination (R. 243).

Defendant-intervener contends that there had been such a disagreement as authorized the Umpire to make a decision, but the contrary appears from the correspondence.

On March 1, 1939, the German Commissioner addressed to the Umpire, Justice Roberts, a letter apprising the latter of his retirement (R. 145). Had he stopped here and said no more, we hardly see how, under the terms of the treaty, his retirement could have been contested, to say nothing of treating it as if it had not been made. Nevertheless, he went on to give his reasons, the substance of which was that he was convinced that the Umpire was not acting impartially.

The United States Commissioner, Mr. Garnett, in his letter of March 3, 1939 (R. 150), stated that at the last meeting it was "agreed that we should proceed to examine the whole record to determine whether, upon the whole record, the American case has been proven", and that it was while they were examining this question that the German Commissioner retired. This seems to destroy the theory later advanced by Mr. Garnett that the German Commissioner's withdrawal is to be treated as ineffective because it prevented them from rendering a decision on opinions finally arrived at and stated (R. 178). It also

completely answers the assertion that when Umpire Roberts assumed to make an award, he had before him that final disagreement of the Commissioners which was essential to his exercise of the power to decide.

What we have here stated is furthermore confirmed by the last two paragraphs of Commissioner Garnett's letter to Mr. Hull, Secretary of State, of March 3, 1939. The paragraph next to the last expressly states that the subject of the conference between the Commissioners and the Umpire on February 28 and March 1, 1939, was whether the evidence adduced to prove that the Hamburg (1930) award was induced by fraudulent testimony was sufficient for that purpose (R. 151). The last paragraph reads as follows:

> "After the conference had extended for a considerable time, the Umpire expressed himself in entire agreement with me on this proposition. Thereupon the German Commissioner argued that, if upon an examination of the whole record both before and subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, the petition would have to be dismissed, and he urged upon the Umpire and myself that we should consider the whole evidence for that purpose. We thereupon proceeded to examine the whole record to determine from that record whether the American case had been proven. It was while the Commission was engaged in examining this question that Dr. Huecking's action in regard to his retirement was taken" (R. 151).

As it thus conclusively appears by the American Commissioner's deliberate admission, in an official letter addressed to the Secretary of State, that, when the German Commissioner retired, the Commissioners and the Umpire

were engaged in an examination of all the evidence with a view to determine what their eventual position should be, it is not possible legally to defend the contention that the Umpire's award was rendered upon such a disagreement between the Commissioners as the arbitral agreement contemplates.

A court does not reach the stage of final disagreement because the judges, in discussing what its judgment should be, express varying or conflicting views.

V.

Even if properly constituted, the Mixed Claims Commission was not empowered to grant a rehearing.

On October 16, 1930, an award was made dismissing the sabotage claims (R. 224, 260). No action could be taken with respect to said awards except upon the consent of both contesting sovereigns, and no such sovereign consent was in fact given. On the contrary, the German Government, from first to last, protested any further action on said claims on the ground that the Mixed Claims Commission was *functus officio* as to said claims. Under such circumstances, a new and different award would have been void as in excess of power, even if the German Commissioner had consented to the new award, because the German Commissioner had no power to bind his government beyond the terms of the original agreement of submission. Agents of sovereign powers have no authority to bind their sovereigns *in invitum* to acts in excess of power because their function on such a tribunal is always limited by the terms of the submission.

The authorities are clear that a final award is subject to revision only on the consent of the contesting sovereigns.

In Hyde on International Law, the following language appears (p. 157), Volume Two:

> "The decision of an international tribunal over matters as to which it is made the supreme arbiter is said

to be final, and not the subject of revision, except by the consent of the contesting sovereigns."

In the *Cerruti* case (*Italy* v. *Colombia*), 10 Rev. du Droit Pub. 523, 526, President Cleveland was the arbitrator. The Colombian Government protested against Article 5 of the award. Secretary of State Sherman replied to the Colombian Minister, May 9, 1897 (For. Rel. 1898, pp. 250, 251):

> "The President of the United States, whether he be the individual who acted as arbitrator, or his successor in office, became under any circumstances, *functus officio*, so far as the arbitration was concerned, upon the rendition of his award and could not undertake to reopen the arbitration and reconsider the award under any just view of the powers conferred upon him as arbitrator by the protocol under which he acted. Should the parties to the arbitration invite the reconsideration of the award in question, in whole or part, or request its interpretation in any respect, that could only be accomplished by a new submission and arbitration."

To this effect see also *Claim of Manuel de Cala*, 2 Moore's International Arbitrations, 1273-4.

In the *Claim of Benjamin Weil*, 2 Moore's International Arbitrations, 1324, 7 Moore's Digest, 63-8, an award in favor of claimant Weil had been made by the United States and Mexican Claims Commission of 1868.

Upon an application for rehearing the Umpire refused the motion on the ground, as stated in Moore's Int. Arb., Vol. II, page 1329:

> "* * * (1) that he had no right to consider any evidence besides 'that which had already been before the commissioners, had been examined by them, and transmitted to the umpire'; (2) that, as he had already examined that evidence with all the care of which he was capable, it was not likely that a re-

examination of it would alter his opinion; (3) that as his decisions had, without his wishes being consulted, been made public, *and as they were known by the convention to be final and without appeal,* it was probable that they had been made the basis of transactions which an alteration or reversal of them might seriously prejudice; and (4) *that, in his opinion, the provisions of the convention in effect debarred him from rehearing cases which he had already decided, and deprived each government of the right to expect that any claim should be reheard.*" (Italics ours.)

In *Frelinghuysen* v. *Key,* 110 U. S. 63, which was an action by the assignee of part of the Weil claim to mandamus the Secretary of the Treasury to pay the award, Chief Justice Waite of the Supreme Court said at page 72:

"As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two governments or otherwise. Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not now seek to do."

This language was approved in *Boynton* v. *Blaine,* 139 U. S. 306, 321-2 (1891).

In Ralston, The Law and Procedure of International Tribunals, §371, pp. 207-8, the following is stated:

"371. *Rehearings and revision.*—Rehearings have been repeatedly refused by umpires, either of their own decisions or of those of their predecessors, such being also the stand taken by the commission appointed pursuant to the treaty of Guadalupe Hidalgo, and it being said by Baron Blanc of the Spanish-American Claims Commission that he did not consider

himself 'empowered to review the formal decisions of the precedent umpires, such decisions being essentially definitive, according to international usages.'"

In view of the principle thus authoritatively established and repeatedly applied, it is clear that the so-called award of 1939 in favor of the Sabotage Claimants constituted a usurpation of powers to which the following passage in an article by the Norwegian Professor Castberg, L'Exces de Pouvoir dans la Justice Internationale Academie de Droit International, Recueil des Cours, 1931, I, p. 448, is directly applicable:

> "If there has been a usurpation of power, the so-called 'judgment', pronounced by the judge, has in reality no value as judgment. It is absolutely void. It is non-existent from a juridical point of view." (Translation ours.)

Castberg, *supra,* also in the same article says (p. 388) in regard to non-observance of the rules of the Commission:

> "An arbitral tribunal may also commit an excess of power by applying to its proceedings rules of procedure differing from those which were prescribed to the tribunal. This disregard of the rules of procedure does also involve an excess of power." (Translation ours.)

and further at page 442:

> "If an international tribunal would assume a power without basing it on an agreement between the parties, there would actually be a usurpation of power. The judgment should then be a nullity for the parties. The same would be true if the judgment is only apparently based upon an agreement of the parties—in other words, if the reference by the court to the

agreement between the parties is only aimed to cover a usurpation of power. Also in this case the judgment would be a nullity." (Translation ours.)

In Oppenheim, International Law, 5th Ed., Vol. 2, page 28, the following is stated:

"The first is that their jurisdiction is essentially grounded in the will of the parties as expressed in the compromise or in the general arbitration treaty and that an award in the excess of the power conferred upon them is null and void as having no legal basis whatever."

Elihu Root as Secretary of State, took on February 28, 1907, a similar position regarding the case of the Orinoco Steamship Company, as appears by the following passage in Hyde, International Law, Vol. 2, page 158:

"Declared Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 28, 1907, respecting the claim of the Orinoco Steamship Company: 'A decree of a court of arbitration is only final provided the court acts within the terms of the protocol establishing the jurisdiction of the court. * * * A disregard of such terms necessarily deprives the decision of any claim to finality.' For. Rel. 1908, 774, 783, See, also, Same to Same, June 21, 1907, id., 800, 802-803."

Nor has there been a single instance in which the Mixed Commission, when legally constituted and actually existing, set aside or revised its awards, except "on agreed statements, recommending awards, signed by both the German Agent and the Agent of the United States" (R. 93).

In the American Journal of International Law of January, 1940, pages 23, 24, the counsel for one of the sabotage claimants (a former solicitor of the Department of State),

referring to the decision of December 15, 1933, in this case, says as follows:

> *"The significance of this decision in international law is that it is the first instance known to the writer in which a decision of an international tribunal obtained by fraud, collusion, and suppression of evidence by witnesses of one of the parties has been reopened and reheard by the tribunal itself."*. (Italics ours.)

As regards the finality of decisions, Article VI of the Agreement between the United States and Germany of August 10, 1922, creating the Mixed Claims Commission, expressly provides that "the decisions of the Commission and those of the Umpire (in case there may be any) shall be accepted as final and binding upon the two Governments." Accordingly, the rules enacted by the Commission do not provide for a rehearing, nor did the Commission, when legally constituted and actually existing, ever grant a rehearing.

In *U. S. on behalf of Philadelphia-Gerard National Bank*, Op. and Dec., p. 939, the Commission, referring to a claim previously dismissed, said (p. 940):

> "Although the rules of this Commission, conforming to the practice of international Commissions, make no provision for a rehearing in any case in which a final decree has been made, this Petition and the supporting Memorandum and evidence have been carefully considered by the Commission."

To the same effect see: *U. S. on behalf of S. Stanwood Menken* v. *Germany*, Op. and Dec., p. 837; *U. S. on behalf of Knickerbocker Insurance Co.* v. *Germany*, Op. and Dec., pp. 912, 914.

VI.

The shares of stock of Agency of Canadian Car & Foundry Company, Ltd., being entirely owned by Canadian Car & Foundry Company, Ltd., a Canadian national, the Commission had no jurisdiction to grant it any award.

Appellant contends that, as the Commission's jurisdiction is limited to claims of United States nationals, an award to a Frenchman, a Canadian, or any other non-American national, is wholly void, both because it is contrary to the express terms of the agreement, and because it would deprive American nationals of their proportionate share of the special deposit fund out of which awards are paid.

In the case of Agency of Canadian Car & Foundry Co., Ltd., there is no dispute that the shares of stock of the claimant company are entirely foreign-owned (R. 186); we contend that the court cannot obtain jurisdiction by reason of the fact that some of the shares of the *parent* company are American-owned.

In Administrative Decision No. II (Dec. and Op. Mixed Claims Commission U. S. and Germany, p. 8), the Commission held:

> *"Original and continuous ownership of claim.*—In order to bring a claim (other than a Government claim) within the jurisdiction of this Commission, the loss must have been suffered by an American national, and the claim for such loss must have since continued in American ownership."

Prior to the pronouncement of the American Commissioner and the Umpire in favor of the Agency of Canadian Car & Foundry Company, Ltd., when the Mixed Claims Commission was legally in suspension, the commission, legally constituted and validly functioning, uniformly held

that awards could be made only in favor of American nationals.

H. Herrmann Manufacturing Co. (M. C. C., U. S. and Ger. Docket No. 173);
American Congo Company (M. C. C., U. S. and Ger. Docket No. 504);
Gans Steamship Line (M. C. C., U. S. and Ger. Docket No. 6625);
A. Klipstein and Co. (M. C. C., U. S. and Ger. Docket No. 540);
Lezcano & Company, sucesores (M. C. C., U. S. and Ger. Docket No. 13787);
Henry Cachard and Herman Harjes (Dec. and Op., M. C. C., U. S. and Ger., p. 634);
Societe du Chemin de Fer de Bagdad (Dec. of Mixed Arbitral Tribunals, Vol. I, pp. 401-407).

In the case of *I'm Alone*, 29 American Journal of International Law (1935), p. 326, a tribunal was created under an agreement between Canada and the United States consisting of Justice Van Devanter of the Supreme Court of the United States and Judge Duff of the Supreme Court of Canada. The first question was whether the Commissioners could enquire into the beneficial or ultimate ownership of the "I'm Alone" or of the shares of the corporation that owned the ship. The answer was in the affirmative, and in the final report, the Commissioners decided (p. 330) *that in view of the fact that the beneficial ownership was entirely in citizens of the United States, no compensation ought to be paid in respect of the loss of the ship or the cargo.*

In Ralston's Law and Procedure of International Tribunals, Rev. Ed., page 155, the following is stated (citing numerous authorities):

"The mixed commissions sitting by virtue of the Versailles and subsequent treaties have several times rendered decisions upon the general subject. Thus, for instance, it has been held that a corporation formed

in Germany and controlled by Frenchmen can claim as a victim of exceptional measures of war, a house which has its site for business affairs in Germany, but of which no associate is German, cannot be considered as a German subject;"

The question of nationality is jurisdictional.

Burthe v. *Denis*, 133 U. S. 514.

In that case a claim, French in origin, was presented by France on behalf of the executor of the estate of a French national for the value of the property damaged through occupation by the military authorities of the United States. Some of the heirs of the French national, who had a beneficial interest in the claim, were French citizens, others Americans. The Supreme Court held that the Commission under the express terms of the Convention between United States and France creating it was without jurisdiction to consider the claim of the Americans and make an award in their favor.

CONCLUSION.

Therefore, the questions herein are questions of general importance, and questions of substance relating to the construction of statutes and treaties of the United States, and the application should be granted.

Respectfully submitted,

FRANK ROBERSON,
HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
Solicitors for Petitioner, Z. & F. Assets Realization Corporation.

JOHN BASSETT MOORE,
JOSEPH M. PROSKAUER,
Of Counsel.

BLANK PAGE

Appendix.

Constitution of the United States, Article III, Section 2, Clause 1:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

* * * * * * *

Treaty of Berlin, 42 Stat., Part 2, page 1939:

"(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV."

* * * * * * *

English text of agreement between the United States and Germany for a Mixed Commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded between the two Governments on August 25, 1921, signed August 10, 1922.

AGREEMENT.

The United States of America and Germany being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their pleni-

potentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany, and THE PRESIDENT OF THE GERMAN EMPIRE, Dr. Wirth, Chancellor of the German Empire, who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I.

The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II.

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning

which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III.

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV.

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V.

Each Government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI.

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

ARTICLE VII.

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August, 1922.

[SEAL.] ALANSON B. HOUGHTON.
[SEAL.] WIRTH.

Rule VIII of the Rules of Procedure of the Mixed Claims Commission, United States and Germany (as adopted November 15, 1922, and as amended from time to time, to December 31, 1932) as set forth in the Appendix to Opinions and Decisions, Mixed Claims Commission, United States and Germany from October 1, 1926 to December 31, 1932 (p. XLII):

VIII.

Decisions.

(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.

(b) The Umpire shall at all times have the right to the complete record in any and all cases and to hear oral argument in his discretion.

(c) The Umpire may join with the two National Commissioners in announcing—or in the event of their disagreement certified to him shall announce—principles and rules of decision applicable to a group or groups of cases for the guidance as far as applicable of the American Agent, the German Agent, and their respective counsel, in the preparation and presentation of all claims.

(d) All decisions shall be in writing and signed by (1) the Umpire and the two National Commissioners, or (2) by the two National Commissioners where they are in agreement, or (3) by the Umpire alone when the two National Commissioners have certified their disagreement to him. Such decisions need not state the grounds upon which they are based.

Settlement of War Claims Act of 1928, 45 Stat. 254, Sec. 2.(a), (b), (c), (d); Sec. 4:

SEC. 2. (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the

awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany (referred to in this Act as the "Mixed Claims Commission").

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon in accordance with the award, accruing before January 1, 1928.

(c) The Secretary of the Treasury is authorized and directed to pay annually (as nearly as may be) simple interest, at the rate of 5 per centum per annum, upon the amounts payable under subsection (b) and remaining unpaid, beginning January 1, 1928, until paid.

(d) The payments authorized by subsection (b) or (c) shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe, but only out of the German special deposit account created by section 4, within the limitations hereinafter prescribed, and in the order of priority provided in subsection (c) of section 4.

* * * * * * *

SEC. 4 (a) There is hereby created in the Treasury a German special deposit account, into which shall be deposited all funds hereinafter specified and from which shall be disbursed all payments authorized by section 2 or 3, including the expenses of administration authorized under subsections (c) and (m) of section 3 and subsection (e) of this section.

(b) The Secretary of the Treasury is authorized and directed to deposit in such special deposit account—

(1) All sums invested or transferred by the Alien Property Custodian, under the provisions of section 25 of the Trading with the Enemy Act, as amended;

(2) The amounts appropriated under the authority of section 3 (relating to claims of German nationals); and

(3) All money (including the proceeds of any property, rights, or benefits which may be sold or otherwise disposed of, upon such terms as he may prescribe) received, whether before or after the enactment of this Act, by the United States in respect of claims of the United States against Germany on account of the awards of the Mixed Claims Commission.

(c) The Secretary of the Treasury is authorized and directed, out of the funds in such special deposit account, subject to the provisions of subsection (d), and in the following order of priority—

(1) To make the payments of expenses of administration authorized by subsections (a) and (m) of section 3 or subsection (e) of this section;

(2) To make so much of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), as is attributable to an award on account of death or personal injury, together with interest thereon as provided in subsection (c) of section 2;

(3) To make each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount thereof is not payable under paragraph (2) of this subsection and does not exceed $100,000, and to pay interest thereon as provided in subsection (c) of section 2;

(4) To pay the amount of $100,000 in respect of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount of such authorized payment is in excess of $100,000 and is not payable in full under paragraph (2) of this subsection. No person shall be paid under this paragraph and paragraph (3) an amount

in excess of $100,000 (exclusive of interest beginning January 1, 1928), irrespective of the number of awards made on behalf of such person;

(5) To make additional payments authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), in such amounts as will make the aggregate payments (authorized by such subsection) under this paragraph and paragraphs (2), (3), and (4) of this subsection equal to 80 per centum of the aggregate amount of all payments authorized by subsection (b) of section 2. Payments under this paragraph shall be prorated on the basis of the amount of the respective payments authorized by subsection (b) of section 2 and remaining unpaid. Pending the completion of the work of the Mixed Claims Commission, the Secretary of the Treasury is authorized to pay such installments of the payments authorized by this paragraph as he determines to be consistent with prompt payment under this paragraph to all persons on behalf of whom claims have been presented to the Commission;

(6) To pay amounts determined by the Secretary of the Treasury to be payable in respect of the tentative awards of the Arbiter, in accordance with the provisions of subsection (s) of section 3 (relating to awards for ships, patents, and radio stations);

(7) To pay to German nationals such amounts as will make the aggregate payments equal to 50 per centum of the amounts awarded under section 3 (on account of ships, patents, and radio stations). Payments authorized by this paragraph or paragraph (6) may, to the extent of funds available under the provisions of subsection (d) of this section, be made whether or not the payments under paragraph (1) to (5), inclusive, of this subsection have been completed;

(8) To pay accrued interest upon the participating certificates evidencing the amounts invested by the

Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld);

(9) To pay the accrued interest payable under subsection (c) of section 2 (in respect of awards of the Mixed Claims Commission) and subsection (h) of section 3 (in respect of awards to German nationals);

(10) To make such payments as are necessary (A) to repay the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld), (B) to pay amounts equal to the difference between the aggregate payments (in respect of claims of German nationals) authorized by subsections (g) and (h) of section 3 and the amounts previously paid in respect thereof, and (C) to pay amounts equal to the difference between the aggregate payments (in respect of awards of the Mixed Claims Commission) authorized by subsections (b) and (c) of section 2, and the amounts previously paid in respect thereof. If funds available are not sufficient to make the total payments authorized by this paragraph, the amount of payments made from time to time shall be apportioned among the payments authorized under clauses (A), (B), and (C) according to the aggregate amount remaining unpaid under each clause;

(11) To make such payments as are necessary to repay the amounts invested by the Alien Property Custodian under subsection (b) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of the unallocated interest fund); but the amount payable under this paragraph shall not exceed the aggregate amount allocated to the trusts described in subsection (c) of section 26 of such Act;

(12) To pay into the Treasury as miscellaneous receipts the amount of the awards of the Mixed Claims

Commission to the United States on its own behalf on account of claims of the United States against Germany; and

(13) To pay into the Treasury as miscellaneous receipts any funds remaining in the German special deposit account after the payments authorized by paragraphs (1) to (12) have been completed.

(d) 50 per centum of the amounts appropriated under the authority of section 3 (relating to claims of German nationals) shall be available for payments under paragraphs (6) and (7) of subsection (c) of this section (relating to such claims) and shall be available only for such payments until such time as the payments authorized by such paragraphs have been completed.

(e) The Secretary of the Treasury is authorized to pay, from funds in the German special deposit account, such amounts, not in excess of $25,000 per annum, as may be necessary for the payment of the expenses in carrying out the provisions of this section and section 25 of the Trading with the Enemy Act, as amended (relating to the investment of funds by the Alien Property Custodian), including personal services at the seat of government.

(f) The Secretary of the Treasury is authorized to invest and reinvest, from time to time, in bonds, notes, or certificates of indebtedness of the United States any of the funds in the German special deposit account, and to deposit to the credit of such account the interest or other earnings thereon.

(g) There shall be deducted from the amounts first payable under this section to any American national in respect of any debt the amount, if any, paid by the Alien Property Custodian in respect of such debt which was not credited by the Mixed Claims Commission in making its award.

BLANK PAGE